INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions Presented	2
Statutes and Regulation involved	2
Statement	3
Summary of Argument	5
Argument:	
I. Failure to register for the draft is a continuing offense for purposes of the statute of limitations	10
II. The privilege against self-incrimination is not a defense to a prosecution for failure to register for military service	21
III. There was no error in the trial court's refusal to charge the jury that it had to acquit petitioner if it found that his refusal to register was based on sincerely held religious beliefs	29
Conclusion	34

CITATIONS

Cases:

Albertson v. *Subversive Activities Control Board*, 382 U.S. 70 ..... 22, 24

Bolling v. *Sharpe*, 347 U.S. 497 33

Bramblett v. *United States*, 231 F. 2d 489, (C.A.D.C.), certiorari denied, 350 U.S. 1015 ..... 11, 16, 18, 20

Campbell Painting Corp. v. *Reid*, 392 U.S. 286 27

Canada Packers, Ltd., v. *Atchison, T., & S.F. R. Co.*, 385 U.S. 182 15

Cantwell v. *Connecticut*, 310 U.S. 296 30

373-200—70——1

Cases—Continued

	Page
Chandler v. *United States*, 171 F. 2d 921, certiorari denied, 336 U.S. 918	17
Chaunt v. *United States*, 364 U.S. 360	29
Costello v. *United States*, 365 U.S. 265	29
Fogel v. *United States*, 162 F. 2d 54, certiorari denied, 332 U.S. 791	15
Fowler v. *United States*, 352 F. 2d 100, certiorari denied, 383 U.S. 907	28
Frost Trucking Co. v. *Railroad Commission*, 271 U.S. 583	23
Gara v. *United States*, 178 F. 2d 38, affirmed on other grounds by an equally divided court, 340 U.S. 857	15
Gardner v. *Broderick*, 392 U.S. 273	25
Garrity v. *New Jersey*, 385 U.S. 493	23
Gay v. *United States*, 408 F. 2d 923	28
Grosso v. *United States*, 390 U.S. 62	22
Gruenwald v. *United States*, 353 U.S. 391	16, 17, 18
Hamilton v. *Regents*, 293 U.S. 245	30
Hanf v. *United States*, 235 F. 2d 710, certiorari denied, 352 U.S. 880	17
Haynes v. *United States*, 390 U.S. 85	22
Hoffman v. *United States*, 341 U.S. 479	26
In Re Summers, 325 U.S. 561	31
Jacobson v. *Massachusetts*, 197 U.S. 11	30
Korholz v. *United States*, 269 F. 2d 897	17
Leary v. *United States*, 395 U.S. 6	22, 24
Lichter v. *United States*, 334 U.S. 742	14
Lorenzo v. *Wirth*, 170 Mass. 596	27
Malloy v. *Hogan*, 37 U.S. 1	26
Marchetti v. *United States*, 390 U.S. 39	8, 22, 25, 29
McDonald v. *United States*, 89 F. 2d 128	18
McGregor v. *United States*, 206 F. 2d 583	15
Minor v. *United States*, Nos. 189, 271, this Term, decided on December 8, 1969	25, 29

Cases—Continued

	Page
Morgan v. *United States*, 309 F. 2d 234, certiorari denied, 373 U.S. 917	25
Murphy v. *Waterfront Commission*, 378 U.S. 52	22
Paul v. *United States*, 371 U.S. 245	14
Pendergast v. *United States*, 317 U.S. 412	11
People v. *Gold Key Club, Inc.*, 152 N.Y.S. 2d 669	17
Red Lion Broadcasting Co. v. *Federal Communications Commission*, 395 U.S. 367	15
Reynolds v. *United States*, 98 U.S. 145	30
Schmerber v. *California*, 384 U.S. 757	27
Selective Draft Law Cases, 245 U.S. 366	30
Sherbert v. *Verner*, 374 U.S. 398	32
Smith v. *United States*, 348 U.S. 147	28
Teague v. *Regional Commissioner of Customs, Region II*, 404 F. 2d 441, certiorari denied, 394 U.S. 977	24
United States v. *Bendik*, 220 F. 2d 249	21
United States v. *Benjamin*, 328 F. 2d 854, certiorari denied, *sub nom. Howard* v. *United States*, 377 U.S. 953	18
United States v. *Cores*, 356 U.S. 405	11
United States v. *Franklin*, 188 F. 2d 182	17
United States v. *Guertler*, 147 F. 2d 796	15
United States v. *Haskell*, 327 F. 2d 281, certiorari denied, 377 U.S. 945	17
United States v. *Irwine*, 98 U.S. 450	16
United States v. *Johns-Manville Corp.*, 213 F. Supp. 65	17
United States v. *Kauten*, 133 F. 2d 703	31
United States v. *Macintosh*, 283 U.S. 605	30
United States v. *Manton*, 107 F. 2d 834, certiorari denied, 309 U.S. 664	17
United States v. *Midstate Co.*, 306 U.S. 161	16, 18

Cases—Continued Page
United States v. *Mersky*, 361 U.S. 431 14
United States v. *Nugent*, 346 U.S. 1 33
United States v. *O'Brien*, 391 U.S. 367 ..... 5, 12, 24, 27, 30
United States v. *Palmer*, 223 F. 2d 843, certiorari denied, 350 U.S. 873 21
United States v. *Rickenbacker*, 309 F. 2d 462, certiorari denied, 371 U.S. 962 25
United States v. *Socony Vacuum Oil Co.*, 310 U.S. 150 16
United States v. *Sullivan*, 274 U.S. 259 24
United States v. *Universal Corp.*, 344 U.S. 218 .. 11, 16, 19
United States v. *Walden*, 411 F. 2d 1109 25
Walker v. *City of Birmingham*, 388 U.S. 307 .. 32
Zemel v. *Rusk*, 381 U.S. 1 ..... 6, 15

Constitution, statutes, proclamations and regulations:
United States Constitution:
Art. I, Sec. 8 30
First Amendment 9, 30, 31, 32
Fifth Amendment 26, 30
Criminal Appeals Act of 1948 15
Marihuana Tax Act (26 U.S.C. 4742, 4744a) .. 23
Military Selective Service Act of 1967 ..... 16, 33
National Firearms Act 23
Selective Training and Service Act of 1940 15
Subversive Activities Control Act 23
Universal Military Training and Service Act .. 5, 15
18 U.S.C. 1001 16
18 U.S.C. 3282 ..... 3, 4, 5, 10, 14
18 U.S.C. 3731 14
18 U.S.C. 4208 3
26 U.S.C. 4401 23
26 U.S.C. 4411 23

Constitution, statutes, etc.—Continued

	Page
26 U.S.C. 4412	23
28 U.S.C. 1254(1)	2
50 U.S.C. App. 453	2, 5, 6, 10, 11, 13
50 U.S.C. App. 454(a)	2, 6, 13
50 U.S.C. App. 456(a)	12
50 U.S.C. App. 460	14
50 U.S.C. App. 462(a)	3
50 U.S.C. 456(j)	33
50 U.S.C. (456(k)	8 12
Presidential Proclamation No. 2799, issued July 20, 1948	10
32 C.F.R.:	
1611.2	12
1611.6	20
1611.7	3, 6, 11
1613.11	24
1613.13	24
1617.1	13
1621.11	33
1622.11	33
1622.14	33
1623.5	13
1625.1	12
1625.2	12
1625.3	12
1625.4	12
1625.11	12
1641.3	13
1641.7	13
1642.2	12
1660.1	33
1660.10	33
1660.20	33
1660.21	33
1660.30	33
1660.31	33

Miscellaneous:

Page

Comment, 34 U. Chi. L. Rev. 79 (1966)..... 32

Legal Aspects of Selective Service, pp. 46–47 (1969 rev.)..... 29

Mansfield, *The Albertson Case; Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information*, 1966 Supreme Court Review 103, 130–131..... 26

United States Selective Service System, *Selective Service Manual* (1945), Section 611.5(d)..... 14

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 441

ROBERT I. TOUSSIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (App. 299–309)[1] is reported at 410 F. 2d 1156. The memorandum opinion of the district court (App. 37–47) is reported in part at 280 F. Supp. 473.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1969 (App. 310). The petition for a writ of certiorari was filed on August 7, 1969, and was

[1] "App." refers to the printed Appendix. "R." preceded by the volume number refers to the four-volume trial transcript on file with the Clerk of this Court.

granted on October 20, 1969 (App. 311). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether failure to register for the draft was a continuing offense, for the purpose of the statute of limitations, until the time petitioner attained the age of twenty-six.

2. Whether, after the initial failure to register, subsequent registration was not required because such late registration might have been self-incriminatory.

3. Whether the trial court erred in declining to instruct that conscientious objection was a defense to a charge of failure to register.

STATUTES AND REGULATION INVOLVED

Section 3 of the Universal Military Training and Service Act, 65 Stat. 76 (50 U.S.C. App. 453), provides:

> Except as otherwise provided in this title it shall be the duty of every male citizen of the United States, and every other male person now or hereafter in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

Section 4 of the Military Selective Service Act of 1967, 81 Stat. 100 (50 U.S.C. App. 454), provides in pertinent part:

* * * * *

* * * That, notwithstanding any other provision of law, any registrant who has failed or refused to report for induction shall continue to remain liable for induction and when available shall be immediately inducted: * * *

* * * * *

18 U.S.C. 3282 provides:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed:

32 C.F.R. 1611.7(c) provides:

The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.[2]

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of knowingly and willfully evading and refusing registration with the Selective Service System in violation of 50 U.S.C. App. 462(a). On November 29, 1968, he was sentenced pursuant to 18 U.S.C. 4208(b), with final fixing of the sentence stayed

[2] These, and additional statutory and regulatory provisions, are set forth in the appendix to petitioner's brief.

pending appeal. The court of appeals affirmed (App. 299–309).

The evidence is undisputed that petitioner not only did not register for the draft in 1959, on reaching his eighteenth birthday, but that he never registered at any time thereafter (App. 77, 98, 161, 176–177; 1 R. 87, 138, 140; 2 R. 280, 310). In February 1967, he was arrested as a draft law violator (App. 102–103; 1 R. 151).

Before trial, petitioner claimed that since his initial failure to register had occurred in 1959, his 1967 indictment and trial were barred by the running of the five-year statute of limitations (18 U.S.C. 3282). The district court denied the motion. The court ruled that petitioner's offense in failing to register was a continuing one and that petitioner had remained under a duty to present himself for registration as long as he was liable for service in the Armed Forces, until age twenty-six, when the statute of limitations commenced to run (App. 38–39).[3] The district court also rejected the pre-trial claim that petitioner was excused from registering after he had failed to do so at age eighteen because "his later registration is

[3] Petitioner was arrested with his thirty-three year old brother and both were charged with failing to register. The district court ruled that as to the brother, the statute of limitations had run as more than five years had elapsed since his obligation to register had terminated at age twenty-six (App. 38–40). As petitioner notes (Pet. Br. 7), the government has acquiesced in the order of dismissal relating to petitioner's brother. Petitioner, however, was born June 23, 1941, and was not yet twenty-six when he was indicted on May 4, 1967, so that the statute of limitations had not even begun to run in his case.

a self-accusatory act which, therefore, he cannot be required to perform" (App. 40–41).

At trial, petitioner claimed to be a conscientious objector whose scruples would not permit him to "even take the first step of registration" (App. 176–178, 238; 2 R. 310–312; 3 R. 432; 437), and caused him to oppose also the performance of civilian service in lieu of military training (App. 241; 3 R. 443). The trial court instructed that petitioner's motive, idealism and philosophy were immaterial, except as aids in determining intent and mental capacity (App. 134–135; 286–287; 2 R. 233–234; 4 R. 589–590).

SUMMARY OF ARGUMENT

I

Section 3 of the Universal Military Training and Service Act (50 U.S.C. App. 453) essentially requires all males between the ages of eighteen and twenty-six to register for the draft. It is our position that this provision imposes a continuing duty to register until age twenty-six. Thus, we submit that petitioner is in error when he asserts that the offense was complete when he failed to register at age eighteen in 1959, and that since more than five years elapsed from that date until the return of the indictment in 1967, the applicable statute of limitations (18 U.S.C. 3282) barred the instant prosecution.

As this Court made clear in *United States* v. *O'Brien,* 391 U.S. 367, the success of our system of conscription for military service depends on the continuing cooperation of all males subject to its reach. Moreover,

both the Act and the regulations in a variety of contexts make plain that there is this continuing duty of cooperation. The fact that Congress in express terms provided in 50 U.S.C. App. 454 that registrants who have failed or refused to report for induction have a continuing obligation to report, hardly shows a congressional intent that violation of the registration requirements of 50 U.S.C. App. 453 should not be treated as a continuing offense. On the contrary, Congress obviously intended these two intertwined provisions to be read *in pari materia.*

Moreover, that registration should be treated as a continuing duty is confirmed by the applicable regulation (32 C.F.R. 1611.7(c)) which, in express terms, imposes a continuing obligation in this regard. This regulation has been in force for a substantial period of time during which Congress has been aware of its existence. It should be adhered to as reflecting a proper interpretation of the law. See, *e.g., Zemel* v. *Rusk,* 381 U.S. 1, 11.

Our view of the statutory obligation to register as a continuing one finds full support in the continuing offense doctrine. The basic difference between a continuing offense and an instantaneous act of criminality is that the former involves a continuous course of conduct, impelled by a single impulse, to achieve an ultimate unlawful objective. Petitioner's intentional failure to register over a period of years fits this rationale since his ultimate objective would not have been achieved simply by failing to register at age eighteen. In order to escape military service, his failure to register had to continue during the entire period of his statutory eligibility.

There are no other reasons for rejecting the continuing offense theory in this case. There are no double jeopardy problems since the government could not make out a separate offense for each day a defendant failed to register. Moreover, petitioner raises a wholly unrealistic claim by urging that under our theory "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen" (Pet. Br. 17). The district court in this very case dismissed an indictment against petitioner's thirty-three year old brother, ruling that the statute of limitations had run as to him since more than five years had elapsed since he reached age twenty-six, and the government acquiesced in that interpretation by not seeking further review.

II

The privilege against self-incrimination is no defense to the instant prosecution. The *Marchetti-Grosso* line of cases dealt with the *initial* failure to register under statutory schemes, in an area permeated with criminal statutes, which posed a Hobson's choice: if the person covered by the scheme failed to register he would be subject to prosecution under the statute commanding registration; if he did register, however, there was a substantial danger that the information provided by him would subject him to prosecution under other criminal statutes.

The statutory scheme involved here is entirely different in that it involves a regulatory and essentially neutral area of inquiry. As such, it does not create a

"real and appreciable" danger of self-incrimination. *Marchetti* v. *United States,* 390 U.S. 39, 48. Nor was petitioner faced with the dilemma faced by the potential registrants involved in th *Marchetti-Grosso* line of cases. As the court of appeals pointed out, petitioner's inaction following his initial failure to register "did not give rise to the threat of punishment beyond that he had already risked" (App. 307).

Petitioner's argument essentially comes down to the claim that one who has failed to comply with the law (as petitioner did when he failed to register at age eighteen) can refuse to comply thereafter (as petitioner failed to do) on the theory that for him to register would reveal his earlier violation. The privilege against self-incrimination has never been given such a sweeping scope. Indeed, under such a rationale any regulatory scheme requiring periodic registration or reporting could be rendered unworkable since one who failed to provide the required information at one point in time could refuse to do so subsequently on the ground that to do would incriminate him for his earlier failure.

At all events, belated registration for the draft would not have been a self-incriminatory act; on the contrary, it would have tended to negate the necessary element of willfulness to support a conviction for the earlier offense. Indeed, in most cases it is fair to say that a male who willfully fails to register at age eighteen, but thereafter does register and evinces

a willingness to perform his military obligation, will not normally be prosecuted for his preexisting violation.

III

The trial court properly refused to instruct the jury that it had to acquit petitioner if it believed that his failure to register was the product of a sincere and conscientious belief.

It has long been recognized that exemption from military training on grounds of conscientious objection is not compelled by the Constitution. Hence, the requirement of registration *per se* does not even raise a First Amendment question; much less does it impose an impermissible burden on the right of untrammeled religious belief. In short, even if it be assumed that petitioner was a conscientious objector—a claim that he chose not to submit to the draft board for examination—no impermissible burden was placed upon his freedom of conscience in requiring that he perform the simple act of registration.

Nor is it an invidious discrimination to require one to undergo a readily available, non-burdensome procedure for determination of entitlement to conscientious objector status. Having failed to take advantage of this available procedure, petitioner should not be heard to complain that many of those who have done so have been granted that status.

ARGUMENT

I

FAILURE TO REGISTER FOR THE DRAFT IS A CONTINUING OFFENSE FOR PURPOSES OF THE STATUTE OF LIMITATIONS

Petitioner contends that the instant prosecution was barred by the pertinent statute of limitations (18 U.S.C. 3282, *supra*, p. 3) because more than five years elapsed between his failure to register on his eighteenth birthday in 1959 and the return of the indictment in 1967.[4] His argument, in short, is that the offense of non-registration was complete at the time of his initial failure to comply in 1959[5] and that he had no duty to register any time thereafter. It is the government's position that registration for military service is a continuing duty; that one who fails to register at age eighteen is not excused from compliance thereafter but has a persisting obligation to register at least until reaching age twenty-six; and hence that the statute of limitations as to the offense of non-registration does not commence to run until after the registrant has reached his twenty-sixth birthday.

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[4] Petitioner's failure to register was first discovered by his local board through an anonymous "tip" (see App. 76–77). He was arrested on this charge on February 3, 1967 (App. 102–103), and the indictment was returned on May 3, 1967 (App. 5). He reached his twenty-sixth birthday on June 23, 1967.

[5] Presidential Proclamation No. 2799, issued July 20, 1948, under the express authority of 50 U.S.C. App. 453, thus provides in pertinent part: "Persons who were born on or after September 19, 1930, shall be registered on the day they attain the eighteenth anniversary of the day of their birth, or within five days thereafter" (see Pet. Br. App. 7).

The duty to register is prescribed by Section 453 (50 U.S.C. App. 453). Under it, eligible persons are required to submit themselves

> to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

The regulation so prescribed provides (32 C.F.R. 1611.7(c)):

> The duty of every person subject to registration to present himself for and submit to registration shall continue at all times, and if for any reason any such person is not registered on the day or one of the days fixed for his registration, he shall immediately present himself for and submit to registration before the local board in the area where he happens to be.

1. We begin with the established proposition that whether an offense is a continuing one or not is entirely a matter of statutory interpretation. See, *e.g., United States* v. *Cores,* 356 U.S. 405; *Pendergast* v. *United States,* 317 U.S. 412, 419–421; *Bramblett* v. *United States,* 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The inquiry is much like that followed in determining the "unit" of the offenses. See, *e.g., United States* v. *Universal Corp.,* 344 U.S. 218, 224. Here, we submit, an examination of the congressional intent underlying the provision involved demonstrates that the explicit provision of the regulation validly reflects that petitioner's obligation to register for the draft was a continuing one until he attained age twenty-six and, correspond-

ingly, that his failure to perform that duty was a continuing offense.

Thus, Congress has provided for a continuing process of cooperation, classification, and impartial selection, with registration being but a necessary first step. Cf. *United States* v. *O'Brien*, 391 U.S. 367, 381. The statutory provisions and the regulations adopted to implement the Selective Service System reflect the concept that continuing duties are essential if the system is to respond successfully to continually changing circumstances. Illustrations may be found in the fact that even as to the narrow class of persons who are exempted from registration itself, that exemption is not permanent, but terminates "after the cause therefor ceases to exist" (50 U.S.C. App. 456(k)); [6] initial classification of a registrant is not necessarily permanent; [7] on the contrary, if, in the period before induction, a registrant's status changes in a relevant manner he may be reclassified.[8] This obviously requires that a registrant keep a draft board regularly advised of all information necessary for efficient and prompt action in regard to his draft status, a duty which the regulations make explicit.[9]

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[6] Those exempted from registration include males already in the military service, members of reserve units, students enrolled in the service academies, foreign diplomats and other special classes of aliens (see 50 U.S.C. App. 456(a); 32 C.F.R. 1611.2, 1642.2.)

[7] See 32 C.F.R. 1625.1.

[8] See 32 C.F.R. 1625.2, 1625.3, 1625.4, 1625.11.

[9] For example, registrants are required to keep their registration and classification certificates in their "personal possession

Petitioner seeks to overcome the fact that the statutory and regulatory framework is characterized by continuing obligations by arguing (Pet. Br. 13) that if Congress had intended that there be a continuing duty to register under 50 U.S.C. App. 453 it would have said so explicitly. In support, he points to 50 U.S.C. App. 454, which does in express terms impose a continuing duty on registrants who have failed or refused to report for induction "to remain liable for induction and when available shall be immediately inducted." [10] But the analogy is misleading. Failure to report for the last step in the process does not have the inherent quality of continuity which would naturally pertain to the first step of what is known to be the continuing process of selection. Thus, Congress might have thought it necessary to be explicit as to the duty to report while finding it unnecessary to do so as to the failure to register.

Sections 453 and 454 are necessarily interrelated provisions and must fairly be read *in pari materia*. By making clear in Section 454 that those males already registered have a continuing duty to submit them-

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at all times". See 32 C.F.R. 1617.1 (registration certificate); 32 C.F.R. 1623.5 (classification certificate).

See also 32 C.F.R. 1641.7, which provides, in relevant part, that "[i]t shall be duty of every classified registrant to keep his local board currently informed of his occupational, marital, family, dependency, and military status, of his physical condition, of his home address * * *." See also 32 C.F.R. 1641.3, imposing upon each registrant the duty "to keep his local board advised at all times of the address where mail will reach him".

[10] This provision was added to Section 454(a) by the Military Selective Service Act of 1967, enacted June 30, 1967, 81 Stat. 100, about two months after the return of the indictment in this case.

selves to induction even after an initial failure to comply with an order to report, Congress must have also intended that those upon whom this continuing duty would have to fall—*i.e.*, those required to register—would also be subject to a continuing duty to place themselves within the manpower pool.

Petitioner argues that this regulation is *ultra vires* and can have no effect since it is not a "law" within the exception proviso of the statute of limitations (Pet. Br. 19–24).[11] This argument begs the question since, on our submission, it is the Selective Service Act itself which makes registration a continuing duty; the regulation merely spells out an intent already inherent in the statutory scheme. At all events, the power to implement the laws pertaining to the selective service process is given to the President (50 U.S.C. App. 460), and regulations adopted pursuant to such power have the force of law. See *Lichter* v. *United States*, 334 U.S. 742, 785; *Paul* v. *United States*, 371 U.S. 245, 255; compare *United States* v. *Mersky*, 361 U.S. 431, holding that a regulation intertwined with a statute is a "statute" for the purposes of the Criminal Appeals Act (18 U.S.C. 3731).

The instant regulation, moreover, has a long history.[12] The lower courts have consistently recognized

[11] The statute of limitations (18 U.S.C. 3282) provides in pertinent part that "[*e*]*xcept as otherwise expressly provided by law*, no person shall be prosecuted * * * unless the indictment is found * * * within five years next after such offense shall have been committed" (see Pet. Br. App. 5; emphasis added).

[12] See Section 611.5(d) of United States Selective Service System, Selective Service Manual (1945).

that it properly implements the statutory scheme by expressly making the duty to register a continuing one. See *Fogel* v. *United States*, 162 F. 2d 54, 55 (C.A. 5), certiorari denied, 332 U.S. 791; *McGregor* v. *United States*, 206 F. 2d 583, 584 (C.A. 4); *United States* v. *Guertler*, 147 F. 2d 796 (C.A. 2); *Gara* v. *United States*, 178 F. 2d 38, 40 (C.A. 6), affirmed on other grounds by an equally divided court, 340 U.S. 857. In these circumstances, it is wholly proper to apply here the settled rule that the "interpretation expressly placed on a statute by those charged with its administration must be given weight by courts faced with the task of construing the statute." *Zemel* v. *Rusk*, 381 U.S. 1, 11; see also *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381; *Canada Packers, Ltd.* v. *Atchison, T., & S.F.R. Co.*, 385 U.S. 182, 184. Of course, the statute might be more explicit, but it doubtless seemed unnecessary to put into statutory language a regulation which Congress had left untouched through various statutory revisions.[13]

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[13] As noted, such a regulation was in existence as early as 1945 (see *supra* p. 14, n. 12). The Selective Training and Service Act of 1940 (54 Stat. 885), the conscription statute in effect during World War II, was expressly reenacted in 1946 except as to specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In

2. Our conclusion is entirely consistent with accepted legal principles regarding continuing offenses. A continuing offense has been defined as "a continuous unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent force, however long a time it may occupy." *United States* v. *Midstate Co.*, 306 U.S. 161, 166; see also *United States* v. *Universal Corp.*, 344 U.S. 218, 224. In instantaneous crimes (*e.g.*, embezzlement or bank robbery) the criminal objective is speedily attained. With respect to continuing offenses, however, the aim is not achieved by a single illegal act; a pattern of illegal behavior is normally required to achieve the ultimate objective.[14] Indeed, any course of conduct, designed or required to accomplish the final criminal objective by stages or by waiting, may result in a continuing offense. See *United States* v. *Socony Vacuum Oil Co.*, 310 U.S.

1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

In none of these revisions did Congress, obviously aware of its existence, suggest that it deemed the regulation in question at odds with the statutory purpose.

[14] For example, in *Bramblett* v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015, it was held that falsification of payroll authorization under 18 U.S.C. 1001 was properly charged as a continuing crime since the scheme involved a pattern of conduct, rather than the individual acts which merely exemplified that pattern. See also *Grunewald* v. *United States*, 353 U.S. 391. Compare, however, *United States* v. *Irvine*, 98 U.S. 450, where the offense—embezzlement of funds by an attorney from his client—was essentially completed even though the injury to the client persisted over the years. Any other result, this Court concluded in *Irvine*, would mean that even after twenty years of withholding of the funds the crime would continue, with attendant great difficulties of proof (see 98 U.S. at 452).

150, 253 (conspiracy to restrain trade); *Chandler* v. *United States,* 171 F. 2d 921, 936–937 (C.A. 1), certiorari denied, 336 U.S. 918 (treason); *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664 (obstruction of justice); *Hanf* v. *United States,* 235 F. 2d 710 (C.A. 8), certiorari denied, 352 U.S. 880 (repeated failure to file reports); *Korholz* v. *United States,* 269 F. 2d 897, 899 (C.A. 10) (violation of the Taft-Hartley Act by the continuing guarantee by a corporate official of a bank loan made to an official of a labor union); *United States* v. *Franklin,* 188 F. 2d 182 (C.A. 7) (failure to register under the Alien Registration Act).[15]

When the objective toward which the criminal pattern is directed has been achieved, or when the objective is thwarted short of fruition by governmental discovery, the statute of limitations begins to run. *Grunewald* v. *United States, supra,* 353 U.S. 391, 406; *United States* v. *Johns-Manville Corp.,* 213 F. Supp. 65, 68–69 (E.D. Pa.); *People* v. *Gold Key Club, Inc.* 152 N.Y.S. 2d 669, 673. Of course, that precise point of completion is not ascertainable by any litmus paper test. It depends rather upon the nature of the objective and the means employed to reach that objective

[15] Petitioner's attempted analogy to the offense of failing to file an income tax return (Pet. Br. 15) is inapt. In many instances, at least, the failure to file a tax return is the final rather than the initial act of achieving the unlawful objective. Moreover, a scheme or course of conduct involving income taxes over a period of years may be a continuing offense. *Grunewald* v. *United States, supra,* 353 U.S. 391, 411; *United States* v. *Haskell,* 327 F. 2d 281 (C.A. 2), certiorari denied, 377 U.S. 945.

in each particular case. See *Grunewald* v. *United States, supra,* 353 U.S. 391, 410–411; *McDonald* v. *United States,* 89 F. 2d 128, 133 (C.A. 8).

The instant case falls within the continuing offense rationale. Just as Congress desired to impose a long-term registration requirement on men in petitioner's category, so it was petitioner's objective to avoid compliance with that long-term duty. His objective was not served simply by his failure to register at age eighteen;[16] it required his continued failure to register at any time thereafter until he reached age twenty-six. His own trial testimony unequivocally shows that his overall objective was to continue to avoid registration, classification and any possible military service that might flow therefrom (see App. 161–163, 177–178, 236–239, 241–242). This aim—as the indictment properly charged—involved a studied course of evasion over a period of years (see App. 5). Quite clearly, therefore, petitioner was engaged in "a continuous, unlawful act or series of acts set on foot by a single impulse [evasion of his draft obligation] and operated by an unintermittent force," until his duty to register lapsed. See *United States* v. *Midstate Co., supra,* 306 U.S. 161, 166. This course of conduct was properly regarded as constituting a continuing offense.[17]

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[16] Failure to register at age eighteen was the first essential step in the overall scheme, akin to an early step in a continuing crime such as mail fraud. See *United States* v. *Benjamin,* 328 F. 2d 854, 864 (C.A. 2), certiorari denied *sub nom. Howard* v. *United States,* 377 U.S. 953.

[17] An indictment and a conviction may be based on the continuing scheme of one person, just as well as on a continuing conspiracy of more than one. *Bramblett* v. *United States,* 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015.

3. Petitioner seeks to escape the continuing offense doctrine by raising what he terms "hard questions" which he says would flow from application of this rule in the draft field. These, he alleges, include the question of the time of the completion of the offense, lack of any time limits within which prosecution would have to be instituted and alleged problems of double jeopardy (Pet. Br. 16–18). These are, however, unreal considerations.

The fact that petitioner could not defend against the present indictment by alleging that it was returned after he reached twenty-three does not show that his criminal conduct ceased once he had passed the initial registration period, after reaching age eighteen. If anything, it simply establishes that, as with all continuing offenses, prosecution may fairly take place when the government discovers the wrongdoing—*i.e.*, at any time before the objective is achieved—or within five years after the illegal end is attained—*i.e.*, within five years after petitioner reached age twenty-six.

The contentions regarding alleged problems of fragmentation of the offense and of double jeopardy are equally groundless. Obviously, the government could not make out a separate offense for each day a defendant failed to register (see App. 304a). In construing a criminal statute doubts should be resolved in favor of a construction that avoids the subjection of an offender to multiple convictions by reason of a single unified pattern of behavior even though the behavior continues over a period of time. See *United States* v. *Universal Corp., supra,* 344 U.S. 218; *Bram-*

blett v. *United States*, 231 F. 2d 489, 491 (C.A.D.C.), certiorari denied, 350 U.S. 1015. The manifest purpose of the present statute is to impose a continuing duty to register on those falling within specified age limits. The failure to register, although of a continuing nature, stems from this single impulse and may thus be the subject of only a single prosecution. Indeed, as the court below pointed out, this is confirmed by this very case "since the indictment here charged only one offense—wilfull failure to register over a lengthy period of time" (App. 304).

Petitioner raises a "straw-man" by further urging that under the continuing offense theory "a person seventy years old can be prosecuted for having failed to register fifty-two years before at the age of eighteen" (Pet. Br. 17). The district court in this very case dismissed an indictment against petitioner's thirty-three year old brother, ruling that the statute of limitations had run as to him since more than five years had elapsed since his obligation of service had terminated at age twenty-six (App. 38–40). The government has not appealed from that decision.

Finally, there is no "dilemma" (Pet. Br. 18) posed by the example of a convicted non-registrant who, upon his release from confinement is only twenty-two and continues to refuse to register and thus subjects himself to another prosecution. Under the regulations, such an offender would be registered on the day he was released from prison (see 32 C.F.R. 1611.6;[18]

[18] This provision reads as follows: "Unless he has already been registered, every person subject to registration who is an inmate of

United States v. *Palmer*, 223 F. 2d 893, 894 (C.A. 3), certiorari denied, 350 U.S. 873), and thus could not again be prosecuted for failure to register.[19]

This case presents only the question whether an eligible male has under existing law a continuing duty to register after he attains the age of eighteen until he reaches the age of twenty-six. If the offense is a continuing one, prosecution is not barred by the running of the statute of limitations until five years after his twenty-sixth birthday.

II

THE PRIVILEGE AGAINST SELF-INCRIMINATION IS NOT A DEFENSE TO A PROSECUTION FOR FAILURE TO REGISTER FOR MILITARY SERVICE

Petitioner argues that if we are correct in our view that failure to register is a continuing offense which tolls the statute of limitations, then a "serious constitutional question" is posed involving the privilege against self-incrimination (Pet. Br. 24). He states this problem as follows: "If it is held that one has a

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an insane asylum, jail, penitentiary, reformatory, or similar institution shall be registered on the day he leaves the institution."

[19] *United States* v. *Bendik*, 220 F. 2d 249 (C.A. 2), relied on by the petitioner dealt with the question of double jeopardy for a failure *to report for induction* and involved a defective first indictment which alleged a refusal to report on a certain date in 1951. The second indictment correctly alleged the date to be in 1952. No continuing course of conduct was asserted. The court of appeals held that if two orders had been issued, in 1951 and 1952, two separate offenses would have been committed and that the abortive first trial therefore was not a bar to the second.

continuing *duty* to register, under penalty of criminal sanction, registration at any time after the date first required therefor is tantamount to compelling an admission of criminal culpability for prior failure to register" (*ibid.;* emphasis in original). Petitioner concludes that the statutory framework thus makes him as "vulnerable to prosecution" (Pet. Br. 25) as were the defendants in the *Marchetti-Grosso* line of cases.[20] The reasons articulated in the cases relied upon have no application here; on the contrary, the values which the privilege against self-incrimination helps to protect (see, *e.g., Murphy* v. *Waterfront Commission,* 378 U.S. 52, 55) would be distorted, not furthered, by the acceptance of petitioner's argument.

1. The contention that the privilege is applicable in the present context under the *Marchetti-Grosso* line of cases stretches the rationale of those cases beyond anything suggested in those decisions. The duty required of petitioner here differed in a fundamental way from the duties imposed on the potential registrants dealt with in *Albertson, Marchetti, Grosso, Haynes,* and *Leary.* The inhibition on the privilege in those cases essentially stemmed from the fact that the *initial* registration might well serve to incriminate the person required to register with respect to other crimes. The governmental schemes involved in those cases were thus "designed primarily for and utilized to pierce the anonymity of citizens engaged in criminal activ-

[20] *Marchetti* v. *United States,* 390 U.S. 39; *Grosso* v. *United States,* 390 U.S. 62; *Haynes* v. *United States,* 390 U.S. 85; *Leary* v. *United States,* 395 U.S. 6; *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70.

ity * * *." *Grosso* v. *United States*, 390 U.S. 62, 72, 76 (concurring opinion of Mr. Justice Brennan).

The statutory scheme in *Albertson* (under the Subversive Activities Control Act of 1950, 64 Stat. 993–994) required that Communist party members file with the Attorney General information regarding their membership. Failure to register would "risk onerous and rapidly mounting penalties" as well as the danger of prosecution (382 U.S. at 76); on the other hand, registration could be used to prosecute the registrant under a variety of other statutes (see 382 U.S. at 77–78). *Marchetti* and *Grosso* involved prosecutions for failure to register and pay the excise tax under the wagering tax provisions (see 26 U.S.C. 4401, 4411, 4412), where such registration would have revealed information entailing the "real and appreciable" danger of criminal prosecution (see *Marchetti*, 390 U.S. at 48). Precisely the same dilemma was involved in the *Haynes* and *Leary* registration schemes.[21] In sum, under all of these statutory frameworks the potential registrant was faced with a "choice between the rock and the whirlpool"[22]: if he failed to register he was subject to prosecution under the statute commanding registration; if he did register there was a substantial risk that the information he provided would subject him to prosecution under

[21] *Haynes* involved registration under the National Firearms Act (26 U.S.C. 5851), and *Leary* involved the requirement under the Marihuana Tax Act that a transferee of marihuana obtain a written order form before transferring marihuana (see 26 U.S.C. 4742, 4744a).

[22] *Garrity* v. *New Jersey*, 385 U.S. 493, 496, quoting from *Frost Trucking Co.* v. *Railroad Commission*, 271 U.S. 583, 593.

other criminal statutes. Compounding this Hobson's choice was the fact that the statutory schemes were aimed "at a highly selective group inherently suspect of criminal activities," dealt with "an area permeated with criminal statutes, where response to any of the form's questions in context might involve the petitioners in the admission of a crucial element of a crime" (*Albertson* v. *Subversive Activities Control Board, supra* 382 U.S. at 79), and where either compliance or non-compliance "created a 'real and appreciable' hazard of incrimination." *Leary* v. *United States*, 395 U.S. 6, 18.

The statutory scheme involved here is of a different cast. It involves a regulatory and essentially neutral area of inquiry. The obligation to register extends to all males within the specified age limits (*United States* v. *O'Brien*, 391 U.S. 367, 372), and, in substance, the inquiries are "neutral on their face and directed at the public at large * * *" (*Albertson, supra*, 382 U.S. at 79;[23] see also *United States* v. *Sullivan*, 274 U.S. 259). Providing information in such circumstances is no different in nature than complying with the requirements contained in many other governmental regulatory schemes.[24] The registration requirements of

[23] The information required of a registrant, insofar as here pertinent, includes his name, place of residence, date of birth and his signature (see 32 C.F.R. 1613.11–1613.13).

[24] The requirement that "neutral" information be provided in regulatory non-criminal areas has been repeatedly upheld by the courts. See, *e.g.*, *Teague* v. *Regional Commissioner of Customs, Region II*, 404 F. 2d 441 (C.A. 2), certiorari denied, 394 U.S. 977 (obtaining a license in order to receive packages sent

the present statute thus do not create "real and appreciable," as opposed to "merely 'imaginary and unsubstantial,' hazards of self-incrimination." *Marchetti* v. *United States*, 390 U.S. 39, 48; *Minor* v. *United States*, No. 189, this Term, decided December 8, 1969.

Another critical distinction is that petitioner was not caught in the same dilemma that faced the defendants in these other cases. As noted, those potential registrants were faced with the choice of incriminating themselves if they registered or risking criminal prosecution for failure to register if they did not. Cf. *Gardner* v. *Broderick*, 392 U.S. 273, 277. Here, however, as the court of appeals pointed out, petitioner's "inaction did not give rise to the threat of punishment beyond that he had already risked. The Government has conceded that only one offense is committed by failing to register between the ages of 18 and 26, and its actions have been consistent with its words. [Petitioner] was indicted for and convicted of only one offense—failing to register on his 18th birthday or at any time. By doing nothing—as indeed was his course—Toussie was not being put to a cruel choice that the privilege is designed to avoid" (App. 307).

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from hostile nations); *United States* v. *Rickenbacker*, 309 F. 2d 462 (C.A. 2), certiorari denied, 371 U.S. 962 (census questionnaire); *United States* v. *Walden*, 411 F. 2d 1109, 1114 (C.A. 4) (distillery registration); *Morgan* v. *United States*, 309 F. 2d 234, 237 (C.A.D.C.), certiorari denied, 373 U.S. 917 (purported attorney's duty to disclose his true name, identity and the fact of his non-admission to the bar).

2. Viewed against this background, petitioner's argument necessarily reduces itself to the assertion that he may justifiably invoke the privilege because *his* own dereliction—*i.e.*, failure to register at age eighteen—has placed him within the " 'selective group inherently suspect of criminal activities' "—*i.e.*, those who have failed to register on time and have a continuing duty to register. This argument appears to mean that where one has failed to comply with the law (as petitioner did when he failed to register at age eighteen) he can refuse to comply thereafter on the theory that for him to register would reveal his earlier violation.

On this reasoning, it would presumably follow that a person could excuse his failure to pay income tax for a particular year on the ground that payment might disclose that he had failed to file a return the prior year—a separate crime. Again, it would also appear to follow that one who failed to obtain or renew a driver's license in one year would have a complete defense for his failure to procure a permit in any subsequent year or years, for to do so might provide a "link in the chain of evidence" establishing the earlier dereliction. See *Malloy* v. *Hogan*, 378 U.S. 1, 11–12; *Hoffman* v. *United States*, 341 U.S. 479, 486–487. This stretches the Fifth Amendment not only far beyond its terms but also farther than it has been stretched in any other case.[25]

[25] Petitioner's reliance (Pet. Br. 32–33) on Professor Mansfield's article in the 1966 issue of the Supreme Court Review (*The Albertson Case; Conflict Between the Privilege Against Self Incrimination and the Government's Need For Informa-*

Perhaps the most apt analogy indicating the length petitioner's theory takes him relates to the very framework of the Selective Service System itself. In *United States* v. *O'Brien,* 391 U.S. 367, this Court determined that the requirement that a registrant have his Selective Service certificate continuingly available was vital to the proper functioning of the Selective Service system (see 391 U.S. at 378–381). Yet under petitioner's argument this ruling could be rendered meaningless. A registrant could thus willfully burn his draft card and immunize himself from obtaining another one. In other words, by invoking the privilege a person could fully immunize himself from the requirement that he carry a draft card, though this is a requirement which the Court in *O'Brien* deemed vital to the proper operation of a military service system. The admonition of Mr. Justice Holmes that "[t]oo broadly generalized conceptions are a constant source of fallacy" (*Lorenzo* v. *Wirth,* 170 Mass. 596, 600) is fairly applicable to petitioner's argument here.

3. Even assuming *arguendo* that there is surface plausibility to the claim that because of his initial failure to register petitioner's predicament—even though created by his own wrongdoing—entitles him to invoke the privilege,[26] there is, in any event, a sound

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tion, pp. 103, 130–131) is misplaced. The language quoted relates to the *initial* obligation to register, not a refusal to register thereafter on the ground that it involved incrimination as to the earlier refusal.

[26] But see *Schmerber* v. *California*, 384 U.S. 757, 762, where this Court pointedly stated that "the privilege has never been given the full scope which the values it helps to protect suggest." And see *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286.

basis for concluding that the invocation of the privilege did not provide a defense in this case.

Had petitioner registered some time subsequent to his eighteenth birthday, he would not have committed "an act of compulsory self-incrimination" (Pet. Br. 27). On the contrary, belated registration, if anything, would have tended to negate the necessary element of willfulness ~~necessary~~ required to support conviction of the offense with which he was charged. Any extrajudicial statement as to his date of birth, made after petitioner may have finally appeared for registration, would have been insufficient in itself to prove that an earlier failure to register had been willful. See *Smith* v. *United States*, 348 U.S. 147, 155; *Gay* v. *United States*, 408 F. 2d 923, 931–932 (C.A. 8). Cf. *Fowler* v. *United States*, 352 F. 2d 100, 107 (C.A. 8), certiorari denied, 383 U.S. 907.

Indeed, in the usual case it is to a person's advantage to register belatedly, rather than not to register at all. While there is no formalized policy on the matter, it is fair to say that a male who willfully fails to register at age eighteen, but thereafter does register and shows a willingness to perform his military obligation, will not normally be prosecuted for his pre-existing violation. The purpose of the Selective Service System is not to put men in prison but to provide them for the military establishment.[27] Cf. Selective Service Sys-

[27] Of course, a different situation would present itself where the late registration had resulted in a benefit—*e.g.*, avoidance of participation in the Armed Forces during a time of national emergency, or where at the time of registration, the late registrant

tem, *Legal Aspects of Selective Service,* pp. 46–47 (1969 rev.). Thus, had Toussie, in fact registered—albeit at a time subsequent to the time he was required to—and had he then evidenced a desire to comply with his military obligations, the chances of his prosecution for failing to register up to that point would have been remote at best,[28] and the danger of incrimination "imaginary and unsubstantial." *Marchetti* v. *United States, supra,* 390 U.S. 39, 48; see also, *Minor* v. *United States,* No. 189, this Term, decided December 8, 1969.

III

THERE WAS NO ERROR IN THE TRIAL COURT'S REFUSAL TO CHARGE THE JURY THAT IT HAD TO ACQUIT PETITIONER IF IT FOUND THAT HIS REFUSAL TO REGISTER WAS BASED ON SINCERELY HELD RELIGIOUS BELIEFS.

Petitioner urges (Pet. Br. 33–43) that his constitutional rights were violated because the trial court refused to instruct the jury that it had to acquit petitioner if it believed that his failure to register was the product of a sincere and conscientious belief (see App. 48–51, 136, 292).[29] This contention is insubstantial and warrants only summary discussion.

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had acquired a status upon which a claim of exemption or deferment could be based. Prosecution in such circumstances could properly be viewed as remedial—*i.e.*, prevention of the registrant's profiting from his belated compliance. Cf. *Costello* v. *United States,* 365 U.S. 265; *Chaunt* v. *United States,* 364 U.S. 350.

[28] As a matter of fact, in this very case in response to an inquiry from the trial court government counsel advised that had petitioner registered a year after his eighteenth birthday he would never have been indicted (App. 57–58).

[29] The trial court instructed that petitioner's motive and philosophy were immaterial except as aids in determining his

Congress has constitutional authority "[t]o raise and support Armies" (Art. 1, Sec. 8), and, to effectuate that specific grant of authority, the power to register and thereafter conscript manpower for the national defense. *Selective Draft Law Cases*, 245 U.S. 366; *United States* v. *O'Brien*, 391 U.S. 367. Of course, Congress may not carry out this power in a way which violates the First Amendment. Nor may a court or Congress arbitrarily discriminate between persons or classes in violation of the due process clause of the Fifth Amendment. No such transgression of constitutional rights occurred here.

However unfettered may be the freedom to believe, it does not require that religious scruples be recognized as justifying disobedience to a valid law. *E.g., Cantwell* v. *Connecticut*, 310 U.S. 296, 303–304; *Jacobson* v. *Massachusetts*, 197 U.S. 11, 29; *Reynolds* v. *United States*, 98 U.S. 145. The requirement that all males within specified ages register for the draft is such a valid law.

In *Hamilton* v. *Regents*, 293 U.S. 245, 268, a group of persons sought exemption from compulsory military training at the University of California on religious grounds. Their claim was rejected. Quoting with approval the language in *United States* v. *Macintosh*, 283 U.S. 605, 623–624, this Court observed (293 U.S. at 264):

> The conscientious objector is relieved from the obligation to bear arms in obedience to no

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intent and mental capacity (see App. 286–287, 134–135). (The issue of mental responsibility is no longer in the case.)

> constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. * * * The privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution but from the acts of Congress. * * * [T]he war powers * * * include * * * the power, in the last extremity, to compel the armed service of any citizen in the land, without regard to his objections or his views in respect of the justice or morality of the particular war or of war in general. * * *

In a concurring opinion, Justice Cardozo, joined by Justices Brandeis and Stone, recognized that an extension of the conscientious objector's liberty might lead to wholly incongruous situations (293 U.S. at 268):

> Manifestly a different doctrine would carry us to lengths that have never yet been dreamed of. The conscientious objector, if his liberties were to be thus extended, might refuse to contribute taxes in furtherance of a war * * * or in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government. One who is a martyr to principle—which may turn out in the end to be a delusion or an error—does not prove by his martyrdom that he has kept within the law.

See also *In Re Summers,* 325 U.S. 561; *United States* v. *Kauten,* 133 F. 2d 703, 708 (C.A. 2) (Augustus Hand, J.). The requirement of registration *per se* does not even raise a First Amendment question;

much less does it impose an impermissible burden on the right of untrammeled religious belief.

Only if the Free Exercise Clause is broadened to encompass a general right of conscience to object to and refuse to comply with specific governmental policies would that provision be available to petitioner. And if that provision is given such a sweeping scope, it would of necessity extend beyond the Selective Service context and reach all matters as to which an individual claimed to have conscientious scruples. See generally Comment, 34 U. Chi. L. Rev. 79, 102 (1966). Such a construction of the First Amendment finds no support in our history or in our jurisprudence. Cf. *Walker* v. *City of Birmingham*, 388 U.S. 307, 320–321. Its natural tendency would be to destroy the orderly functioning of government and to undermine the integrity of the democratic process. In short, even if it be assumed that petitioner was a conscientious objector—a claim that he chose not to submit to any draft board for examination—no impermissible burden was placed upon his freedom of conscience in requiring that he perform the simple act of registration.[30]

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[30] Petitioner's heavy reliance on *Sherbert* v. *Verner*, 374 U.S. 398, is not warranted. *Sherbert* dealt with the power of a State to preclude a Seventh Day Adventist from receiving unemployment benefits where she refused because of her conscientious religious scruples to work on Saturday. As this Court pointed out, this statute directly impeded the free exercise of religion by forcing Sherbert "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand" (374 U.S. at 404)—and this

Petitioner further complains (Pet. Br. 43–46) that exemptions from military service for conscientious objectors may be discriminatory in that such relief does not encompass conscientious objectors who feel they cannot bring themselves to register. But Congress has not only provided an exemption for conscientious objectors, but it has also provided a readily available, non-burdensome method for the determination of such claims.[31] See *United States* v. *Nugent*, 346 U.S. 1. Few would contend that it is an invidious discrimination (see, *e.g.*, *Bolling* v. *Sharpe*, 347 U.S. 497, 499) to require that unless one first comply with the registration requirement he is in no position to contend that he is entitled to conscientious objector status.

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without a showing that the conduct regulated "invariably posed some substantial threat to public safety, peace or order" (374 U.S. at 403, 406–408). It is thus distinguishable from the case here where the national interest in having all males register for the draft is of paramount importance and where the act of registration places at most a minimal burden on conscientious objection to war.

[31] The statutory provision regarding conscientious exemption is now Section 6 (j) of the Military Selective Service Act of 1967 (50 U.S.C. App. (Supp. IV) 456 (j)). The regulations set forth the specific procedures under which registrants may seek conscientious objector status. See, *e.g.*, 32 C.F.R. 1621.11, 1622.11, 1622.14, 1660.1, 1660.10, 1660.20, 1660.21, 1660.30, 1660.31.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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